

STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals,
Peter D. O'Connell, P.J., and Jane E. Markey and Michael J. Talbot, J.J.
Affirming the Circuit Court for the County of Kent, Dennis C. Kolenda, J.

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

vs

ANGEL HERNANDEZ-GARCIA,

Defendant-Appellant.

Supreme Court
No. 129038

Court of Appeals
No. 252516

Kent County Circuit
Court No. 02-00104-FH

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PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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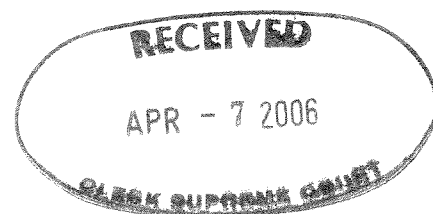


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STATEMENT OF APPELLATE JURISDICTION

The People accept Defendant-Appellant's jurisdictional statement.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

-I-

IS THE JUDICIALLY CREATED DEFENSE OF “TEMPORARY INNOCENT POSSESSION” TO THE CHARGE OF CARRYING A CONCEALED WEAPON (CCW) NOWHERE CONTAINED IN THE CCW STATUTE, SO THAT THE STATUTE CANNOT BE READ TO CONTAIN THAT DEFENSE; AND MAY A DEFENDANT CHARGED WITH CCW UNDER CERTAIN CIRCUMSTANCES HAVE A RECOGNIZED COMMON LAW DEFENSE OF NECESSITY THAT WOULD EXCUSE HIS OTHERWISE CRIMINAL CONDUCT, BUT A DEFENSE THAT (1) DOES NOT INVOLVE A MENS REA ISSUE, AND (2) CANNOT APPLY WHERE A SUSPECT’S TAKING OF A WEAPON DID NOT PREVENT A GREATER HARM THAN THE CRIME HE OTHERWISE COMMITTED?

The Trial Court, by implication, answered “Yes.”

Defendant-Appellant answers “No.”

Plaintiff-Appellee answers “Yes.”

-II-

WHERE THE EVIDENCE PRESENTED DID NOT JUSTIFY A VALID AFFIRMATIVE DEFENSE, EITHER OF TEMPORARY INNOCENT POSSESSION OR NECESSITY, WAS THE TRIAL COURT’S DECISION TO DECLINE SUCH AN INSTRUCTION PROPER, NOTWITHSTANDING THE COURT’S INITIAL INSTRUCTION TO THE JURY ON THE DEFENSE OF TEMPORARY INNOCENT POSSESSION?

The Trial Court answered “Yes.”

Defendant-Appellant answers “No.”

Plaintiff-Appellee answers “Yes.”

COUNTER-STATEMENT OF FACTS

The defendant was convicted at trial of carrying a concealed weapon on his person, to wit: a pistol, MCL 750.227(2). The defendant did not contest the elements of the charge; his defense at trial was, and his defense on appeal has been, that his possession of a pistol was momentary and innocent.

On December 16, 2001, Grand Rapids Police Officer Jeffrey Freres responded to a report of shots fired in the area of Dickinson and Madison Street (1b). The defendant, who was walking in the area, did not respond to a command to halt; Officer Freres, who knows a little Spanish but is not fluent, gave the command to halt in Spanish (2b). The defendant did not immediately stop, but instead stepped up his pace and walked away from Officer Freres. The defendant eventually stopped and turned to face Office Freres. At that time, Officer Freres saw a gun tucked into the defendant's waistband (2b). The defendant had not up to that point mentioned that he had a gun (5b). A subsequent search revealed the presence of two live .380 rounds in the magazine of the gun, and another live round in the chamber. The defendant had in his left jacket pocket another round that fit the gun (2b). The gun was ready to fire (3b). Officer Freres later searched the area from which the shots had been reported fired, and the place where the defendant said he had disarmed two men who jumped him, but was unable to find any shell casings (3b). The defendant appeared to be intoxicated (4b). Officer Freres looked to see if the defendant had any visible injuries, such as to the hands or knuckles, consistent with having been in a fight, but he saw no such injuries (5b).

Officer Elliott Bargas is a patrol supervisor. Because Officer Bargas is fluent in Spanish, he was called to the scene to interview the defendant (6b). The defendant told Officer Bargas that he had been stopped by two men who asked if he wanted to buy drugs. When he told the

men no, they pulled a gun. He said that he wrestled the gun away and two shots rang out. He said he shot two rounds into the air to scare away the men (6b). The defendant said he had been at a friend's house; when asked to point out the house from which he had come, he pointed first to one house, said that might not be it, and then pointed to another house (7b). Officer Bargas administered a preliminary breath test to the defendant, which revealed a blood alcohol level of 0.15 (7b).

The defendant testified that he was approached by two men about purchasing drugs. He said he told the men he wasn't interested. One of the men said that he would sell the defendant a pistol. When the man showed him the pistol, the defendant said he grabbed the pistol from the man, and "loaded it"¹ and "committed the mistake of, umm, shooting it" (11b). He said that "they tried to come after me, and that's when I shot two – I fired two shots in the air" (11b). He said that he did not hear the police officer at first, because the officer said "stop," but then heard him say "policia" (12b). He said that he "didn't want to stop" (12b). He said he put the magazine in the gun after he obtained possession of the gun because "I thought they might follow me, they might take it away from me, and then they can kill me" (12b).

The trial judge declined to instruct the jury on a possible defense of temporary innocent possession. The trial judge noted that he had been given a proposed instruction on the first day of trial, based on *People v Coffey*, 153 Mich App 311; 395 NW2d 250 (1986), and drafted such an instruction, but said that "from the very beginning I expressed concern about the viability of that defense and, frankly, ultimately decided that it was not a viable defense. And that's why, not

¹ The defendant's testimony was rendered in Spanish, and the quoted language is the translator's interpretation, not the defendant's actual words. The translator later said that the defendant's actual words should have been translated to say that he racked the gun, rather than that he loaded it (15b).

only was the jury not instructed on it, but told it wasn't a defense, inasmuch as the issue had been raised at the very beginning of the trial" (27a). The trial judge concluded that *Coffey* was no longer the law, because it did not analyze the "temporary innocent possession" defense in terms of the statute, and that intervening decisions from this Court had held that courts should not read into statutes things not found in the statute (27a). "It's really no different than a Court of Appeals' decision based on a statute which is subsequently changed. It's very clear that once the underlying statute changes, the Court of Appeals' decision is no longer binding precedent. I think here the basic underlying premise has been completely decimated by higher authorities, and, therefore, the lower – the Court of Appeals' decision is no longer applicable" (28a). The Court also noted that the defense of temporary innocent possession was not consistent with the statute's purpose, since "it's perfectly possible to disarm a person without having to conceal the weapon, and, therefore, to do everything that this defense creates, without violating the statute. The concealment is the gravamen of the offense" (28a).

The defendant appealed of right. The Court of Appeals, in a published decision, agreed with the trial court that *People v Coffey* could no longer be considered good law in light of intervening decisions from this Court (2a–5a)

The defendant sought leave to appeal to this Court. On January 13, 2006, the Court entered an order granting defendant's application, and directing the parties "to include among the issues briefed the possible relevance of the *mens rea* principle recognized in *People v Tombs*, 472 Mich 446, 454-459 (2005), to the claim that MCL 750.227(2) should be interpreted to include a momentary innocent possession defense" (1a).

SUMMARY OF ARGUMENT I

The statute prohibiting carrying a concealed pistol, MCL 750.227(2) does not contain a “temporary innocent possession” exemption, and the decision of the Court of Appeals in *People v Coffey*, interpreting the statute to contain such a defense, cannot be justified as a matter of statutory interpretation.

This Court’s decision in *People v Tombs* recognized that, with exceptions not applicable in the case at bar, all crimes require a mens rea, an intent to commit the crime in question. Carrying a concealed weapon requires such an intent. Criminal liability cannot be based on an unknowing possession of a pistol or an honest belief that the item possessed is not a pistol. The defendant must know that he is in possession of a pistol, and must intentionally carry the pistol concealed.

A person who is in possession of a concealed pistol on his person, knowing it to be concealed and to be a pistol, has the mens rea sufficient to satisfy MCL 750.227(2). Mens rea is not defeated simply because the actor has disarmed a wrongful possessor of a pistol or has no ulterior motive in possessing the pistol.

The common-law defense of necessity would, under some circumstances, excuse the acts of one who otherwise violated MCL 750.227(2). Necessity as a defense applies only if the actor, though violating the law, acts to prevent a greater harm than that which would have occurred had the actor not violated the law. On the facts of this case, however, the defendant’s conduct did not prevent a greater harm. The defendant also continued to commit the crime beyond the time necessary to prevent this harm. The defendant was therefore not entitled to an instruction on either temporary innocent possession or necessity.

SUMMARY OF ARGUMENT II

Although the trial court gave a preliminary instruction on “temporary innocent possession” as a defense, the court also had doubts as to the viability of the defense. The defendant had no right to an instruction that was legally and factually erroneous. The trial court’s ultimate decision to decline to instruct the jury on “temporary innocent possession” was proper as a matter of law and fact, and did not deprive the defendant of any substantial right.

ARGUMENT I

THE JUDICIALLY CREATED DEFENSE OF “TEMPORARY INNOCENT POSSESSION” TO THE CHARGE OF CARRYING A CONCEALED WEAPON (CCW) IS NOWHERE CONTAINED IN THE CCW STATUTE, AND THE STATUTE CANNOT BE READ TO CONTAIN THAT DEFENSE. A DEFENDANT CHARGED WITH CCW MAY UNDER CERTAIN CIRCUMSTANCES HAVE A RECOGNIZED COMMON LAW DEFENSE OF NECESSITY THAT WOULD EXCUSE HIS OTHERWISE CRIMINAL CONDUCT, BUT THAT DEFENSE (1) DOES NOT INVOLVE A MENS REA ISSUE, AND (2) CANNOT APPLY WHERE A SUSPECT’S TAKING OF A WEAPON DID NOT PREVENT A GREATER HARM THAN THE CRIME HE OTHERWISE COMMITTED.

Standard of Review. There are several issues at work in this case. The first, whether there is a “temporary innocent possession” defense to MCL 750.227(2) is a question of statutory construction, an issue of law, and is reviewed de novo. *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004). Claims of erroneous jury instructions are also reviewed de novo, but the determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court. *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). Whether there is a common law defense of necessity that would excuse otherwise criminal behavior is also an issue of law, reviewed de novo. *People v Weeder, supra*.

A.

Statutory Construction

Defense counsel requested the following instruction:

Momentary or brief possession of a weapon, even concealed, resulting from the disarming of a wrongful possessor is a valid defense if the defendant had the intention of delivering the weapon to the police at the earliest possible time. For that defense to be available to defendant, the evidence at this trial must prove the following:

(1) that defendant had the gun because he had taken it from someone else who was in wrongful possession of it;

(2) that his possession after taking the gun had been brief;
and

(3) that it was the defendant's intention to deliver the gun to the police at the earliest possible time.

This proposed instruction was based on *People v Coffey, supra*. The defendant in that case presented evidence from witnesses that he had wrestled the gun away from a person who had produced it during a quarrel, and put the gun in his pocket. There was conflicting evidence that the defendant had produced the weapon. The trial court declined the defendant's request for an "innocent temporary possession" instruction. The Court of Appeals reversed. The Court found "it consistent with the statute's purpose to hold that momentary or brief possession of a weapon resulting from the disarming of a wrongful possessor is a valid defense against a charge of carrying a concealed weapon if the possessor had the intention of delivering the weapon to the police at the earliest possible time." *Id.*, 153 Mich App at 315.

The temporary innocent possession defense has been recognized by some other courts. See *United States v Mason*, 233 F3d 619 (DC Cir, 2000), and cases cited therein. *Mason* is a case involving a charge of felon in possession of a firearm, not carrying a concealed weapon. The logic that would create a defense for mere possession of a weapon – where one could conjure up a scenario in which a person with no right to possess a weapon comes into possession of the weapon innocently, by mistake, or in an act of disarming another – doesn't necessarily apply to carrying a concealed weapon, where the defendant could have carried the weapon unconcealed once he obtained possession of it. The defendant's position in the Court of Appeals,

of course, is that this doesn't matter, that *Coffey* remained binding precedent on the trial court, and that the trial court, consistent with *Coffey*, should have given the proffered instruction.

Coffey was a pre-1990 case, so it was not binding on the Court of Appeals under Adm Order 1990-6, 436 Mich lxxxiv, and its progeny. It could hardly be viewed as entrenched precedent. The only published decision to cite it for the innocent possessor instruction issue is *People v Walker*, 167 Mich App 377, 381; 422 NW2d 8 (1988), and no published decision since *Coffey* has reversed a conviction for failure to give the instruction. And the Court of Appeals in the present case properly noted that the logical underpinning of *Coffey* had been severely eroded, if not eviscerated, by intervening case law from this Court concerning the proper role of a court in interpreting a statute.

The goal of statutory construction is to discern and give effect to the Legislature's intent. *McJunkin v Cellasto Plastic Corp*, 461 Mich 590, 598; 608 NW2d 57 (2000). When the plain language of the statute is unambiguous, it is presumed that the Legislature intended the meaning clearly expressed; no further judicial construction is required or permitted, and the statute must be enforced as written. *Weakland v Toledo Engineering Co, Inc*, 467 Mich 344, 347; 656 NW2d 175 (2003). Words must be given their plain and ordinary meaning. Only where the statutory language is ambiguous may the Court look outside the statute to ascertain the Legislature's intent. *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999); *People v Musser*, 259 Mich App 215, 222; 673 NW2d 800 (2004).

In *People v McIntire*, 461 Mich 147; 599 NW2d 102 (1999), this Court held that the Michigan immunity statute, MCL 767.6, contained no implicit condition that immunity was based on truthful testimony. The Court adopted the dissenting opinion of Judge (now Justice) Young, that an appellate court should avoid "judicial speculation regarding the probable, but

unstated, intent of the Legislature with the likely consequence that a court will impermissibly substitute its own policy preferences.” *McIntire*, 461 Mich at 153. A court should not “attempt to create an ambiguity where none exists in order to reach a desired result, albeit one with which [we] might wholeheartedly agree [if we were legislators] authorized to enact policy.” *Id.* A reviewing court must focus on what the Legislature has said, not what the Legislature “must really have meant despite the language it used.” *Id.*, 461 Mich at 157.

The statute that prohibits carrying a concealed pistol, MCL 750.227(2), is clear, straightforward, and unambiguous:

(2) A person shall not carry a pistol concealed on or about his or her person, or, whether concealed or otherwise, in a vehicle operated or occupied by the person, except in his or her dwelling house, place of business, or on other land possessed by the person, without a license to carry the pistol as provided by law and if licensed, shall not carry the pistol in a place or manner inconsistent with any restrictions upon such license.

The statute has no “temporary possession” exception. It does not permit the carrying of a concealed pistol, even briefly, after disarming someone who was in wrongful possession of the pistol. There is simply nothing in the statutory language that justifies the *Coffey* analysis or the giving of an instruction such as that requested by the defendant.

In *People v Pasha*, 466 Mich 378; 645 NW2d 275 (2002), this Court reversed a conviction for carrying a concealed weapon. The defendant in that case had a concealed pistol, but it was in his own house. By the clear terms of the statute, the defendant had not violated MCL 750.227(2). The trial court nonetheless convicted the defendant in a bench trial, and the Court of Appeals affirmed, on the theory that the defendant was a felon, had no right to possess a firearm at all, and could not avail himself of the dwelling house exception. But as this Court noted, to qualify for the dwelling house exception, the defendant only had to show that he was in

his dwelling when he carried the pistol; the statute did not require that the defendant be in lawful ownership of the pistol. “Such an addition to a requirement simply cannot be done by a court. If such a condition is to be added, it must be added by the Legislature.” *Id.*, 466 Mich at 383. The defendant in *Pasha* may have committed another crime, *id.*, n 8, but he did not commit the crime of carrying a concealed weapon.

Pasha precluded reading an additional requirement into a statutory exemption, while the instant case involves a judicially created defense. That is irrelevant. *Coffey* was based on a theory that there “ought to be” such a defense, and the judicial crafting of a defense with no statutory language justifying the defense. As a matter of statutory construction, the answer is clear: the proffered defense of “temporary innocent possession” simply cannot be found in the statutory language.

B.

Mens Rea: *People v Tombs*

That the statute contains no “temporary innocent possession” language does not end the inquiry. As this Court noted in its order granting leave to appeal, strict liability crimes are disfavored, and most crimes require some mens rea. If the defendant lacked mens rea – if, for example, he did not even realize he was carrying a concealed weapon – he would be guilty of no crime, even if he violated the literal terms of the statute.

The United States Supreme Court addressed the basic requirement of mens rea in *Morissette v United States*, 342 US 246; 72 S Ct 240; 96 L Ed 288 (1952). The defendant in *Morissette* took spent shell casings from a government bombing range and sold them for salvage. He thought the casings had been abandoned. The trial court instructed the jury that a lack of

criminal intent was not a defense to the charge. The defendant was convicted of converting government property.

The Supreme Court reversed the conviction. The Court started with the proposition that criminal offenses that do not require a criminal intent are disfavored, and liability without criminal intent would not be found absent an express or implied indication of congressional intent to dispense with the element of intent. *Id.*, 342 US at 250-263. The Court stated:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory 'But I didn't mean to,' and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution. Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will.' Common-law commentators of the Nineteenth Century early pronounced the same principle, although a few exceptions not relevant to our present problem came to be recognized.

Id., 342 US at 250-251. Exceptions included sex offenses where the issue was the complainant's age; crimes involving an omission of duty; crimes of negligence, where the criminal negligence satisfied the usual mens rea requirement; and some strict liability crimes, usually punishable by fines or short terms of incarceration. With those exceptions, the Court observed, courts of various jurisdictions have used terms such as felonious intent, scienter, willfulness, mens rea, or similar formulations "to protect those who were not blameworthy in mind from conviction of infamous common-law crimes." *Id.*, 342 US at 252.

As defendant notes, the United States Supreme Court has on several occasions reiterated this position: that absent a specific legislative declaration eliminating mens rea, some form of guilty knowledge or intent must be shown to posit criminal liability. See *Staples v United States*, 511 US 600; 114 S Ct 1793; 128 L Ed 2d 608 (1994) (crime of possession of an unregistered weapon capable of automatic firing requires a showing that the defendant knew the weapon was capable of automatic firing); *United States v X-Citement Video, Inc.*, 513 US 64; 115 S Ct 464; 130 L Ed 2d 372 (1994) (federal statute prohibiting child pornography required a showing that the defendant knew the material in his possession portrayed children).

In *People v Tombs*, 472 Mich 446; 697 NW2d 494 (2005), this Court applied this principle to a prosecution for distribution of child sexually abusive material, MCL 750.145c(3). The defendant in *Tombs* had the material on a work computer. When he left his job, he returned the computer. The defendant knew that when an employee left, the computer the employee returned would be reformatted, which would completely erase the child sexually abusive material he admitted he had downloaded from the Internet. But before the computer was reformatted, a technician looked on the computer, and found the material in question, buried several directory levels down. There was no doubt the defendant was guilty of possession of child sexually abusive materials; the basic question before this Court was whether the defendant was guilty of distribution of these materials when he returned the computer to his former employer.

This Court found that, since there was no clear indication that the Legislature intended to dispense with the mens rea requirement in MCL 750.145c(3), the silence suggested that the Legislature did not intend to eliminate mens rea. *Id.*, 472 Mich at 456-467. The Court noted that the defendant concealed the images on the computer, and legitimately believed that, on the basis of past practice, the employer who provided him the computer would reformat the computer,

destroying the images. *Id.*, 472 Mich at 461. The defendant had neither the intent nor expectation that anyone would see the images, and thus could not be said to have had the mens rea to be guilty of distribution of child sexually abusive material.

Tombs was a 3-1-3 decision,² but all the Justices of this Court accepted the basic principle for which *Tombs* is here cited and which this Court asked the parties to address: that absent a legislative statement to the contrary, all crimes require a criminal mens rea. The major point, of course, is that without a showing of criminal intent, “otherwise innocent conduct could be criminalized.” *Id.*, 472 Mich at 466, concurring opinion of Taylor, C.J. To the question of whether Carrying a Concealed Weapon, MCL 750.227(2), should require a showing of mens rea, even absent statutory language of a mens rea requirement, the answer is simple: of course it should.

Three hypothetical scenarios will illustrate the point. Suppose a suspect is driving a car, and the car is validly stopped for a traffic infraction. When the suspect opens the glove compartment of the car he is driving to obtain the registration, a handgun falls out. If the suspect truly didn’t know the handgun was there – if, for example, it wasn’t the suspect’s car, or someone else put the handgun in the car and the suspect was not aware of it – would the suspect be guilty of carrying a concealed weapon? The answer must be no: the suspect had no intent to carry a concealed weapon, and to find otherwise would be to criminalize innocent conduct. And if the suspect were charged with carrying a concealed weapon, and testified that he was totally

² Chief Justice Taylor concurred with all of Justice Kelly’s lead opinion, except for the discussion of whether the defendant’s action of obtaining and sharing with others child sexually abusive material over the internet might constitute distributing. But Chief Justice Taylor’s concurrence, and Justice Corrigan’s dissent joined by Justices Weaver and Young, all accepted that the distribution of child sexually abusive material had to be an intentional act.

unaware that there was a gun in the car, would he be entitled to a jury instruction that his total ignorance of the gun's presence was a defense? Again, the answer should be simple: of course he would be entitled to such an instruction.

Suppose a suspect is wearing a bulky coat on a winter's day. Suppose that someone else, while the suspect is inside a building and not wearing the coat, plants inside that suspect's coat a pistol, small enough so that the suspect is unaware, when he puts on the coat, that it is there. The suspect then leaves with the pistol in his coat. Again, the answer should be clear: the suspect has a defense to any potential charge, based on his total lack of intent to carry a concealed weapon.

Finally, suppose that a suspect is in possession of what the suspect honestly believes to be a fake handgun. Suppose the suspect is stopped by a police officer for a traffic violation. Suppose the officer asks the suspect if he has any weapons, and the suspect says, "no, officer, just this fake gun right here." To the shock and surprise of the suspect, the gun is not a fake at all, but is a real firearm, and meets the requirements under MCL 750.227(2) as a concealed weapon. This is a closer call than the first two scenarios, where the suspect was completely ignorant that he even possessed anything at all, and where it could be argued that the suspect didn't really "possess" the firearm. But the suspect nonetheless should, under these circumstances, be entitled to defend that he had absolutely no intent of carrying a concealed weapon, because he truly didn't realize that the item he had in his possession was a concealed weapon. Just as the defendant in *Morisette* committed no crime because he truly believed the property he gathered was abandoned, the suspect in this scenario would have committed no crime because he truly believed the weapon was ersatz instead of real. Ignorance of the law is no excuse; but ignorance of the facts may be.

The People do not maintain that carrying a concealed weapon is a strict liability crime. We agree that a suspect must intend to carry a concealed weapon to be guilty of this crime.

C.

Application of *Tombs* to the “temporary innocent possession” defense

That MCL 750.227(2) requires some mens rea does not, of course, answer the key question presented in this case.

“Mens rea” is generally defined as “a guilty mind; a guilty or wrongful purpose; a criminal intent.” Black’s Law Dictionary (5th Ed). The basis of the mens rea doctrine is to prevent criminal liability for unintended acts. “Deeply ingrained in human nature is the tendency to distinguish intended results from accidental happenings.” Perkins & Boyce, Criminal Law (3d Ed), p 826. “[O]ne of the great contributions of the common law is the conception that there is no crime without a mind at fault.” *Id.*, p 828. But “[t]he type of mind needed from criminal guilt is not the same for all offenses.” *Id.*, p 829. The necessary intent will vary from crime to crime. “Intent includes those consequences which (a) represent the very purpose for which an act is done (regardless of likelihood of occurrence), or (b) are known to be substantially certain to result (regardless of desire).” *Id.*, p 835. “The fact that an intent is conditional or qualified, while not without significance, does not exclude it from the ‘intent’ category. It is a special type of intent rather than some other kind of state of mind.” *Id.*

Carrying a concealed weapon is a general intent crime. It has long been held that the only intent required for conviction of this crime is the intent to do that which the act prohibits, i.e., the intent to carry a weapon concealed. *People v Williamson*, 200 Mich App 342, 346; 166 NW2d 917 (1918). There is no requirement that the weapon be carried for some nefarious purpose. *Id.* For example, it is not a defense to a charge of carrying a concealed weapon that the person who

carried the weapon did not realize his concealed weapons permit had expired. *People v Combs*, 160 Mich App 666, 672-673; 408 NW2d 420 (1987).

The defendant in the case at bar had the requisite mens rea for the crime of carrying a concealed weapon. He intended to carry the weapon and conceal it. He knew precisely what he was doing. That he may have had no ulterior motive, no intent to use the weapon, changes nothing. Even if we suppose that the defendant took the weapon only to remove it from lawbreakers, he nonetheless intended to do precisely that which the statute prohibits.

The facts of the instant case contrast sharply with *Tombs*. In *Tombs*, the defendant had no intent whatsoever to distribute child sexually abusive material. He truly thought the images of child pornography on the computer would be erased by the reformatting, apparently turned in the computer with the reasonable supposition that it would be formatted and any vestigial remnants of such material on the computer would be forever removed. In the case at bar, in contrast, the defendant knew absolutely that he was carrying a concealed weapon, that the weapon was in fact in his possession.

People v Coffey, supra, recognized the “temporary innocent possession” defense, but it did not do so by any analysis of the mens rea requirement for carrying a concealed weapon. Rather, the *Coffey* Court said it was “consistent with the statute’s purpose to hold that momentary or brief possession of a weapon resulting from the disarming of a wrongful possessor is a valid defense against a charge of carrying a concealed weapon if the possessor had the intention of delivering the weapon to the police at the earliest possible time.” *Coffey, supra*, 153 Mich App at 315. The cases on which *Coffey* relied also did not analyze the issue in terms of mens rea. For example, in *Hines v United States*, 326 A2d 247, 248 (DC App 1974), the Court discussed how possession of a weapon might be “excused or justified as stemming from an affirmative effort to

aid and enhance social policies underlying law enforcement.” *People v LaPella*, 272 NY 81; 4 NE2d 943 (1936), involved a man who found a gun in a public restroom, took it, and gave it to the first police officer he saw; that Court simply eliminated from the definition of “possession” a temporary possession for some lawful act, a finding that supports social policy but is an extraordinarily strained reading of the English language. *Logan v United States*, 402 A2d 822 (DC App, 1979), simply accepted the defense on public policy grounds. The only case cited by *Coffey* that even mentions the term “mens rea” is *People v Messado*, 49 App Div 2d 560; 370 NYS2d 616 (1975), but that terse opinion contains no analysis, merely states that while unlawful possession of a weapon requires no mens rea under New York Law, the defense of possession incident to disarming a wrongful possessor nonetheless exists.

We thus submit that, while common law mens rea applies to MCL 750.227(2), such as would present a defense to a truly ignorant and innocent possession of a weapon, the concept of mens rea does not extend to a knowing possession of a concealed pistol, regardless of the actor’s intent in possessing the pistol.

D.

Necessity: a possible defense

Coffey created an exemption in MCL 750.227(2) that just is not there. *Coffey* cannot be justified on the basis of statutory interpretation, nor on an application of traditional common law mens rea principles. And yet, somehow, our instincts say that “temporary innocent possession” should be a potential defense, that a person who truly disarms another person who is threatening others with a dangerous weapon ought not face criminal liability arising solely out of an act that, objectively, appears good and proper. Instinct is, of course, not a legally recognized basis on which to read a statute to say something other than what the statute says. It is not up to this

Court, or any court, to place in the criminal law one's own proper view of social policy. But we believe that the instincts of the *Coffey* Court were good, even if its analysis was flawed. There is a potential common-law defense to MCL 750.227(2): necessity. For reasons to be argued *post*, we do not believe the defendant was, on these facts, entitled to an instruction on that defense, but on the right facts it would be a legitimate defense to present.

The basis of the doctrine of necessity is that, to avoid a greater harm, doing a lesser harm otherwise prohibited by law is justified. "The rationale of the necessity defense is not that a person, when faced with the pressure of circumstances of nature, lacks the mental element which the crime in question requires. Rather, it is this reason of public policy: the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law." LaFave & Scott, *Criminal Law* (2d Ed), § 5.4, p 442. But while grounded in policy considerations, the defense of necessity is not based on an ad hoc decision of a single court that policy issues require a rewriting of a statute; rather it is a common law defense, part and parcel of the historical common law.³

"If, not due to the compulsion of another but as a result of natural forces, one is faced with a situation in which he must either suffer detriment or commit an act that violated the letter of the law, it is spoken of as a case of necessity." Perkins & Boyce, *Criminal Law* (3d Ed), p 1065. Originally, the concept of necessity required some sort of extreme necessity, but courts

³ The concept of necessity long predates the development of English common law. Destruction of property to save human life has always been recognized as justified. See Jonah, 1:4-5. ("The Lord, however, hurled a violent wind upon the sea, and in the furious tempest that arose the ship was on the point of breaking up. Then the mariners became frightened and each one cried to his god. To lighten the ship for themselves, they threw its cargo into the sea.")

came “to recognize that something less than utter extremity would be sufficient to constitute an excuse in some cases of ‘necessity.’” *Id.*, p 1066. For example, a father who in violation of a statute withdrew a child from school before first obtaining permission of a school board would not be guilty of a crime if the absence were necessary because of the child’s illness, and a person caught in a traffic jam would have a defense against a statute prohibiting stopping in the area. *Id.* In an example often used to illustrate the defense, a mountain climber lost in a storm who, in an act necessary to save his life, breaks into a house and eats food found there is not guilty of either burglary or theft. Lafave & Scott, *supra*, § 5.4(c), p 444.

While the early view was that the defense of necessity would be applicable only where the pressure to act came from physical forces of nature rather than from other persons, the modern view is that the defense is not limited to any particular source of danger. *Id.*, p 442, n.6.

To be sure, this defense has stringent limits. The harm sought to be avoided must be greater than the harm done. The defense would not entitle someone to continue violating the law when the necessity for doing so had ended. And it would never apply to justify the murder of a human being. *Id.*, p 446.⁴

Few cases have addressed the contours of the defense of necessity. Much more litigated is the closely related defense of duress. Modern cases have tended to blur the distinction between duress and necessity, instead examining the common policies underlying these traditional defenses. *United States v Bailey*, 444 US 394, 410; 100 S Ct 624; 62 L Ed 2d 575

⁴ There are, to be sure, older cases that address the concept of necessity as justifying murder, for example, the lifeboat cases, where some people were thrown overboard to their certain deaths to lighten the load and keep the boat from sinking, with a net saving of lives, see LaFave & Scott, *supra*, § 5.4(c), p 445, but that particularly thorny, though intellectually interesting, issue is not before the Court.

(1980). Like necessity, duress does not defeat the mens rea. “Rather, it is that, even though he has done the act the crime requires and has the mental state which the crime requires, his conduct which violates the criminal law is justified because he has thereby avoided a harm of greater magnitude.” Lafave & Scott, *supra*, § 5.3(a), p 433.⁵ To receive an instruction on duress as a defense, a defendant must show not only that he committed the acts constituting the crime in question in order to avoid a greater harm, but that he was actually coerced into doing so. *People v Lemons*, 454 Mich 234, 251; 562 NW2d 447 (1997).

Necessity does not require a showing of coercion, of course, but it does require that a defendant demonstrate that he committed the acts constituting the crime in order to avoid an even greater harm that would have resulted had the defendant not acted. It contains the important limitation that, if a legal alternative to violating the law existed, the defense will fail. *United States v Bailey*, *supra*. Generally, to establish a necessity defense a defendant must demonstrate (1) that he was faced with a choice of evils and chose the lesser evil, (2) that he acted to prevent imminent harm, (3) that he reasonably anticipated a causal relation between his conduct and the harm to be avoided, and (4) that there were no other legal alternatives to violating the law. *United States v Dorrell*, 758 F2d 427, 430-431 (CA 9, 1985).

Examples of a proper defense of necessity are easy to imagine. A person who has a suspended driver’s license would be justified in driving if that person were the only one available to take a desperately ill person to a hospital. For example, in *Allen v State*, 123 P2d 1106

⁵ In *People v Luther*, 394 Mich 619, 622; 232 NW2d 184 (1975), this Court held that duress could be a defense to a charge of prison escape, and said that “the compulsion or duress overcomes the defendant’s free will and his actions lack the required mens rea.” Analytically, that is wrong; after all, as noted by LaFave & Scott, *supra*, § 5.3(a), n.4, p 433, if duress overcame mens rea, there would be no rule that precludes duress for intentional killings.

(Alaska App, 2005), the defendant argued that he drove, with a suspended license, only because his mother, who had been driving, suffered double vision, and the defendant thought she needed immediate medical care. The Court held that, under those circumstances, the defendant was entitled to an instruction on necessity as a defense.⁶

A claim of necessity would not apply simply because of a suspect's subjective belief that he was violating the law in order to avoid a perceived greater harm. For example, in *United States v Aguilar*, 883 F2d 662, 692-693 (CA 9, 1989), a claim that defendants violated immigration laws because it was necessary to smuggle aliens into the United States to avoid persecution in their home countries was rejected; no matter how well founded the belief, the defendants had no right to engage in a wholesale violation of the immigration laws and avoid the process of application for asylum.⁷

People v Coffey, supra, presented facts where, if the defendant's rendition of events were true, a necessity defense would be appropriate. In *Coffey*, the complaining witness testified that she got into an argument with the defendant and two other people in her car. She said the defendant pulled a pistol from his jacket, pointed the pistol at her head, and threatened to kill her.

⁶ The Court rejected the argument that the defendant could have walked to a telephone a half mile away, rather than drive, finding that the defendant was entitled to argue that it would have been unreasonable for him to have left his mother alone in the car. The central point is that a person who claims necessity as a defense has to show his conduct was reasonable under all the facts and circumstances, but is not required to negate every imaginable alternative he could have followed.

⁷ Another example would be a suspect who destroys sports utility vehicles, and defends a charge of malicious destruction of property with the argument that such vehicles cause environmental damage, and it is necessary to eliminate them. Even if one agrees with the generic proposition that vehicles with poor gas mileage cause problems and should be eliminated, a person's unilateral decision to destroy property based on that belief could not be justified under the legal doctrine of necessity.

But the passengers in the car said that the complaining witness got the pistol from the trunk of the car, and that the defendant wrestled the gun away from her and put it in his pocket. The defendant at least had an argument that his action, in disarming an aggressor who had herself committed the crime of carrying a concealed weapon, prevented a greater harm from occurring than was occasioned by the criminal act he himself had committed. But the point is not that this necessity defeated the mens rea. Rather, it is that, although the defendant had the requisite intent to commit the crime, he was put into a position where it was reasonable for him to commit the crime in order to avoid a greater evil.⁸

The People agree that, under certain, albeit limited, circumstances, a defendant who carries a concealed weapon, though he has committed all the elements constituting the offense, would nonetheless be entitled to a defense instruction of necessity. If a defendant were to come upon a scene where two people were quarreling and one produced a pistol, and the defendant disarmed the possessor of the pistol, put the pistol in his car and drove away, and took the pistol to the police immediately, the defendant would have a cognizable defense of necessity, notwithstanding that all the elements of the offense were satisfied. But this is not a mens rea defense. It is not a justification to disarm every person whom a defendant knows to be carrying a concealed weapon. It is limited to those rare circumstances where the defendant commits a harm

⁸ The factual validity of this defense in *Coffey* is considerably weakened by the defendant's subsequent actions; after being disarmed by an off-duty police officer, the defendant tried to grab the gun back from the officer, which caused the officer to shoot the defendant in self-defense. *Coffey, supra*, 153 Mich App at 313. But the issue, of course, is not the strength of the defense; it is whether there was evidence from which, even granting that the prosecution proved all the elements of the crime of carrying a concealed weapon, a specific instruction on a defense to the charge would nonetheless be justified.

prohibited by the criminal law, but in so doing has taken reasonable steps to prevent an even greater harm from occurring.

E.

Application to the facts of the case

The final question is whether, if the common law defense of necessity is held applicable in the State of Michigan, the defendant was entitled to an instruction on the defense of necessity. The People submit that the answer to this question is no, because (1) the defendant's request was for the "temporary innocent possession" defense of *Coffey*, essentially a rewriting of the statute not justified by law, and (2) the defendant, by his own admission, created a greater social harm by his conduct than that which confronted him when, according to his version of events, he disarmed the two men who offered to sell him the pistol.

The defendant did not request an instruction on necessity. This Court has held that failure to request an instruction forfeits for appellate review any claim of error. *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994). Review may be only for plain error. *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). The defendant must show a plain error that affected substantial rights. A reviewing court may reverse only when the defendant is actually innocent of the crime or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*, 460 Mich at 774. This standard applies to the review of a claim of constitutional error as well as nonconstitutional error. *Id.*

The defendant did request a "temporary innocent possession" defense. There is no such defense per se. Granted, such a request dances around what could, under other circumstances, be a proper defense of necessity. But the terms are not conterminous. "Temporary innocent possession" could apply to circumstances where a defendant truly did not know he was in

possession of a pistol – in other words, a true mens rea defense. But it could also apply where a defendant simply claimed that he had no evil intent in his possession of the pistol – something that has never been a defense to a violation of MCL 750.227(2). Necessity, on the other hand, has specific limits not contained in the “temporary innocent possession” construct. It applies only where the defendant was confronted with a choice of evils, and reasonably chose to commit what would otherwise be a crime in order to avoid a greater social evil from occurring. It does not justify a defendant in committing the precise social evil someone else committed, on the theory that it was better for the defendant to engage in the particular harm than for someone else to do so.

The defendant’s own testimony was that he was approached by two men who wanted to sell him drugs. When he said he wasn’t interested in buying drugs, the men asked him if he wanted to buy a pistol, and showed the pistol to him. The men did not threaten the defendant with the pistol. There was no evidence that the men ever threatened anyone else with the pistol. Granted that it is socially undesirable for anyone, let alone a drug dealer, to carry a concealed weapon without a permit, the defendant was not presented with any evil other than that one of these men was carrying a concealed weapon. If as the defendant claimed he disarmed the men, the result was that he committed the precise evil they were committing. That was not justified on a theory of necessity.

Compounding the defendant’s problems, he admitted that he fired the gun into the air. Actually shooting a weapon presents a greater social evil than the mere possession of the weapon. In short, the defendant chose not to report the men to the police. He chose not simply to disarm the men. Rather, he chose to take the gun from the men and to fire the gun, an action which of course brought the police to the scene where the defendant was apprehended. And he

chose to load the gun, on the claimed fear that the men he disarmed might come after him. A person ought not be entitled to an instruction on the defense of necessity where the person's actions actually created a greater harm than that which he claimed to be preventing.

Finally, the defendant did not stop when first confronted by the police. In any claim of necessity, a person's otherwise criminal behavior must end when the claimed justification for the behavior ends. For example, a person whose driver's license is suspended but who in an emergency drives a sick friend to the hospital is not justified in continuing to drive when the emergency has ended. The defendant here did not stop when told to do so by the police. Even considering that there was a language issue – the defendant is a native Spanish speaker and apparently knew little English – the defendant's own testimony is that he knew he had been commanded to stop, but didn't do so at first because he "didn't want to stop." A person who says that he is carrying a concealed weapon illegally only because he disarmed a wrongful possessor cannot claim necessity when he continues to possess the gun instead of surrendering it to a police officer; the failure to turn over the weapon at the first reasonable opportunity should preclude any claim of necessity as an affirmative defense.

F.

Conclusion

The doctrine of mens rea applies in any case where it has not been legislatively abrogated. The defense of necessity similarly applies when not otherwise statutorily eliminated. Both are part and parcel of the common law of crimes. In this case, the defendant's mens rea was satisfied beyond any question. In a proper case, a defense of necessity could be interposed to prevent the criminal liability of someone who otherwise had committed the crime of carrying a concealed weapon. But on these facts, the defendant, whose conduct did not prevent a greater harm than

that which he created, in fact who created a greater harm, was not entitled to an instruction on necessity as a defense. We therefore submit that the defendant was not entitled to an affirmative defense instruction, and that the trial court's decision to deny giving such an instruction was proper and should be affirmed.

ARGUMENT II

WHERE THE EVIDENCE PRESENTED DID NOT JUSTIFY A VALID AFFIRMATIVE DEFENSE, EITHER OF TEMPORARY INNOCENT POSSESSION OR NECESSITY, THE TRIAL COURT'S DECISION TO DECLINE SUCH AN INSTRUCTION WAS PROPER, NOTWITHSTANDING THE COURT'S INITIAL INSTRUCTION TO THE JURY ON THE DEFENSE OF TEMPORARY INNOCENT POSSESSION.

Standard of Review. Whether to instruct the jury on a particular point is generally entrusted to the discretion of the trial court, *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). To the extent that the issue is whether the defense proffered even exists as a matter of law, then of course the issue is one of law reviewed de novo for the reasons stated in Argument I, *supra*.

This issue is obviously intertwined with the first issue. But the defendant makes an additional claim: that the trial court allowed him to argue the temporary innocent possession claim, instructed the jury on the claim before the start of proofs, and then sawed off that limb while the defense was sitting on it by refusing to instruct on the defense at the end of the case. The defendant conjures up the image of his counsel being left utterly stupefied by the trial court's decision, and suggests that what occurred was procedurally unfair.

In responding to defense counsel's objections to the instructions, the trial court noted that "from the very beginning I expressed concern about the viability of that defense." (T-II, p 90) The best reading of the record is that defense counsel knew the trial court might decline, at the conclusion of the case, to give the requested instruction.

As noted in Argument I, *supra*, the defendant's own testimony defeated any claim of an affirmative defense, whether couched in terms of "temporary innocent possession" or necessity. Even if the defendant's story is believed, he did not merely disarm a wrongdoer. He actually

fired the gun. He said he kept the gun and loaded it because he feared these men would try to take the gun back. The general purpose of the concealed weapons statute is “to prevent the possibility that quarreling persons would suddenly draw a hidden weapon without notice to other persons.” *People v Nimeth*, 236 Mich App 616, 621; 601 NW2d 393 (1999), quoting *People v DeLeon*, 177 Mich App 306, 308; 441 NW2d 85 (1989). By his own admission, the defendant’s motivation was not merely to turn over the gun to law enforcement. And of course he did not turn over the gun at the first opportunity. He admitted in his testimony that he did not stop when told to do so by the police because he did not want to stop. He had every intention of continuing to possess the gun.

No defendant – nor any litigant, for that matter – is entitled to an instruction if the litigant does not establish prima facie support for the instruction. *People v McKinney*, 258 Mich App 157, 164; 670 NW2d 254 (2003). Even if the “temporary innocent possession” instruction is viable, the failure to give it here, after the defendant’s own testimony showed that it would not be justified, was proper. In short, the trial court’s decision to decline the instruction was correct both legally and factually.

RELIEF REQUESTED

WHEREFORE, for the reasons stated herein, the People respectfully pray that the conviction and sentence entered in this cause by the Circuit Court for the County of Kent be AFFIRMED.

Respectfully submitted,

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Kent County Prosecuting Attorney

Dated: April 5, 2006

By: _____
Timothy K. McMorrow (P 25386)
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